Before the
FEDERAL TRADE COMMISSION
Washington, D.C. 20230

In the Matter of	)	
	)	
Telemarketing Sales Rule	)	File No. R411001

COMMENTS OF THE NATIONAL CABLE &
<u>TELECOMMUNICATIONS ASSOCIATION</u>

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The National Cable & Telecommunications Association ("NCTA') hereby submits its comments on the Notice of Proposed Rulemaking to amend the Federal Trade Commission's Telemarketing Sales Rule, 16 C.F.R. Part 310. NCTA is the principal trade association of the cable television industry, representing operators serving over 90 percent of the nation's cable customers. Its members provide broadband services such as high-speed Internet access and telecommunications services throughout the United States. NCTA's members also include more than 200 cable program networks, as well as companies that provide equipment and services to the industry.

INTRODUCTION

In this proceeding, the FTC proposes a series of amendments to its Telemarketing Sales Rule ("TSR"), which was adopted six years ago pursuant to the Telemarketing Consumer Fraud and Abuse Prevention Act ("the Telemarketing Act").[1] The TSR is a comprehensive rule that, among other things, prohibits specific deceptive and abusive telemarketing acts or practices, requires the disclosure of certain material information to consumers, and prohibits misrepresentations. It also limits the hours that

1 15 U.S.C. §§ 6101–6108. The Telemarketing Act was designed to protect consumers against telemarketing fraud and abusive telemarketing acts or practices.

telemarketers may call consumers, prohibits calls to a consumer who has asked not to be called again, and prohibits a seller or telemarketer from calling a person who has previously asked not to be called by a particular company or seller.[2]

In 1999, pursuant to the Act, the Commission initiated a mandatory review of the rule and found that the TSR had been successful in combating fraudulent telemarketing practices but that encroachments on consumer privacy and consumer sovereignty are increasingly at issue in the current telemarketing environment.[3] The FTC concluded that changes to the TSR were necessary "to enhance the Rule's ability to prevent deceptive telemarketing practices and to enable consumers to exert greater control over when and whether to receive telemarketing calls in their homes."[4]

In particular, the FTC proposes the creation of a centralized national "Do Not Call" registry to be maintained by the agency for a two-year trial period. Under this proposal, consumers would contact the FTC and place their telephone number on the national registry, making it illegal for companies within the FTC's jurisdiction to call consumers on the list. The Commission believes that this "one-stop" method will empower consumers to assert their "do not call" rights quickly and across the board for all companies that engage in telemarketing.[5] Once a consumer has placed his or her telephone number on the national registry, the only way that an individual company may call the consumer is to obtain "express verifiable authorization" from the consumer to make a call to their telephone number.[6]

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2 60 Fed. Reg. 43843 (Aug. 3, 1995); 16 C.F.R. Part 310.

3 Telemarketing Sales Rule, Notice of Proposed Rulemaking ("Notice"), 67 Fed. Reg. 4492, 4494 (January 30, 2002).

4 "FTC Proposes National 'Do Not Call' Registry," Press Release, January 22, 2002.

5 Notice, 67 Fed. Reg. at 4519.

6 Id. at 4499. "Express verifiable authorization" means "the informed, explicit consent of a consumer or donor, which is capable of substantiation." Proposed Rule §310.3(a).

In addition to the national "do not call" registry, the Commission proposes to prohibit the practice of a telemarketer receiving a consumer's billing information from any third party for use in telemarketing, or disclosing any consumer's billing information to any third party for use in telemarketing. The FTC also proposes, among other things, to broaden the definition of "outbound telephone calls" to include certain inbound calls.

As noted above, NCTA's membership is comprised of the nation's leading cable operators whose companies provide multi-dimensional cable and telecommunications services to over 70 million households. These diverse and growing array of services range from traditional video to digital and high definition television to telephone services to high-speed Internet access and data services. During a time of rapid growth and change in the industry, cable companies have made customer care a top priority, including conducting telemarketing of new advanced services in a responsible and responsive way with their customers. Telemarketing is a key component of the industry's commitment to provide a consistently high level of service to its customers.

NCTA appreciates the FTC's efforts to accommodate individuals' privacy concerns in the context of telemarketing while at the same time protect the legitimate business interests of companies that utilize telemarketing. In striking this balance, however, we believe that the Commission has gone too far in some instances by proposing unwarranted and unduly burdensome restrictions that will threaten the continuity of existing business relationships. First, the FTC failed to include an exemption in the "do not call" registry for "established business relationships," despite analogous federal and state telemarketing laws containing such an exemption. This critical exclusion would effectively prevent companies from calling their own customers if the customer's number is on the national registry.

Without it, cable companies, for example, would be hampered in communicating with customers regarding billing, programming, service calls, and conducting market research.

Second, the Commission proposes unnecessary restrictions on the disclosure of customer billing information to third parties as part of legitimate telemarketing activity. Under the proposed rules, the telemarketer would be prohibited from transferring a consumer and his or her product purchase information to another internal or external telemarketer that is offering an additional product or service. Third, in expanding the definition of outbound calls, the FTC unreasonably restricts the transfer of calls between telemarketers representing the same seller and imposes additional requirements on inbound calls where some form of upselling (i.e. the offering of additional services) occurs.

Finally, apart from these concerns, the creation and implementation of a national "do not call" list presents some practical problems and costs that the FTC should take into account in formulating rules for its management and administration.

I. THE PROPOSED NATIONAL "DO NOT CALL" REGISTRY FAILS TO EXEMPT "ESTABLISHED BUSINESS RELATIONSHIPS" AND THEREBY INTERFERES WITH COMMUNICATIONS BETWEEN BUSINESSES AND THEIR CUSTOMERS

As discussed above, the FTC's proposed national "do not call" list would impose a near blanket restriction on all companies' contact with any person who registers his or her telephone number with the agency. This broad rule, which significantly expands the current company-specific "do not call" provision of the TSR, could have the unintended effect of denying existing customers of a particular company with access to information from businesses that they know and trust.

Over the past thirty years, individual cable companies have worked hard to establish a highly valued customer base.[7] NCTA's member companies have found that the majority of their customers appreciate being kept informed of new products and services that suit their interests, particularly discounts and promotional offerings. Telemarketing is one of the tools for informing and maintaining customers and for marketing new cable services, often targeting specific customers based on market research and analysis of which type of customer will value which type of service.

Since the passage of the 1996 Telecommunications Act, the cable industry has invested over $55 billion in private capital to upgrade more than a million miles of plant with fiber optics and digital technology. This massive infrastructure upgrade – which is approximately 80 percent complete – is providing the platform for offering a range of new, advanced services to more than 70 million American households. These services include digital video (which offers more channels, better pictures, video-on-demand, and interactive electronic program guides) and high speed Internet access service, cable telephone services and interactive television. As the industry transforms itself into an integrated provider of video, voice and Internet access services in a highly competitive marketplace, the marketing of new services, including telemarketing, becomes increasingly important. And as demand for these services grows, telemarketing is an efficient means of notifying consumers as new broadband services, deployed and advertised broadly in their community, reach their particular neighborhood.

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[7] Moreover, NCTA awards a "seal of customer service excellence" to its member companies that have demonstrated their commitment to the industry's on-time guarantee program. This program requires cable companies to provide service calls on-time or the customer receives $20, and provide on-time installation calls or the customer receives a free installation. To be awarded the seal, the companies also must have communicated the on-time guarantee message to their customers; and have provided exceptional service, based upon office and telephone availability, response to outages, and communications with customers about products and services, bills and refunds. See NCTA website, www.ncta.com.

Furthermore, in the normal course of business, a cable company may want to contact a customer to follow-up on installation of services, particularly new digital cable and Internet access services. Some companies routinely call such customers within three days of an installation to determine if the service is meeting their expectations. After the initial call, an additional follow-up call may be needed to provide further instruction on new features. Cable companies also may call customers within 30 – 60 days after they disconnect service to offer promotions and other incentives to win them back. And finally, cable companies, like any business, need to contact customers about their bills, particularly delinquent accounts. Depending on the particular situation, these calls may include "upselling" or the offering of additional services.[8]

The problem with outlawing the foregoing types of telemarketing calls to consumers on the national "do not call" list is that many consumers may broadly express the view that they would prefer not to receive any telemarketing calls, but their true wishes may be different when it comes down to particular companies or services. As the FTC acknowledges in discussing the views of various industry representatives, "the same customers who say they would like to stop receiving telemarketing calls may actually welcome certain types of telemarketing calls – for example, special sale price offers from companies with which they have previously transacted business."[9] The Commission's response is that consumers can selectively choose to receive calls from specific companies by providing express verifiable authorization or utilize the company-specific "do not call" approach in the existing FTC regulations. But customers who place their telephone numbers on the national registry may not

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8 The FTC defines "upselling" as any instance when, after a company closes an initial sale, it offers the customer additional products or services. Sometimes the further solicitation is made by the same telemarketer, and sometimes the call is transferred to a different telemarketer. Notice, 67 Fed. Reg. at 4495.

9 Id. at 4519.

appreciate the breadth of the rule and may find it impractical to single out particular companies to grant express written authorization to call them. Moreover, it would be a significant burden on companies to have to obtain such authorization before communicating with their customers on the list.

Many state telemarketing statutes with "do not call" provisions recognize the importance of preserving legitimate, mutually-beneficial commercial activities by exempting "established business relationships."[10] In New York, for example, the telemarketing law exempts "telephone calls pertaining to a renewal or continuation of an existing or prior contractual relationship or the continuation of an established business relationship between a customer and any telemarketer, provided that the telemarketer discloses any material changes in the terms and conditions of the prior contract . . .."[11]

Yet the FTC's rationale for declining to incorporate a specific "established business relationship" exemption in the proposed rule amendments is that such exemption "would be unworkable in the context of telemarketing fraud."[12] It surmises that "a prior business relationship exemption would enable fraudulent telemarketers who were able to fraudulently make an initial sale to a customer to continue to exploit that customer without being subject to the Rule."[13] But this rationale arose in the context of the initial telemarketing rulemaking

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[10] According to the FTC, as of January 2002, twenty states had passed "do not call" statues. And several states are considering laws that would create state-run "do not call" lists. See Notice, 67 Fed. Reg. at 4517, n. 239.

[11] New York General Business Law §399-pp; McKinney's Consolidated Laws of New York Annotated, Chapter 20 of the Consolidated Laws, Article 26. New York also permits "unsolicited telephone calls made by the telemarketer for the purpose of overall efforts to develop new business that include other methods and techniques intended to identify and communicate with potential customers" provided required disclosures are made for all transactions which are incidental to the call. Id. Missouri (Mo. Rev. Stat. §407.1098); see also State of Missouri, 90th General Assembly, Senate Bill 763, effective August 28, 2000.

[12] Notice, 67 Fed. Reg. at 4532.

[13] Id.

proceeding in 1995, which was targeted at protecting consumers from interstate telemarketing *fraud*. Pursuant to the Telemarketing Act's rule review process, the FTC's stated objective in this proceeding is to adopt rule changes that protect consumer *privacy*.

It is precisely in the context of addressing telemarketing privacy concerns that the Federal Communications Commission ("FCC") concluded that established business relationships should be excluded from the telemarketing rules adopted under the Telephone Consumer Protection Act of 1991 ("TCPA").[14] In the TCPA, Congress expressly stated that "[i]ndividuals' privacy rights, public safety interests, and commercial freedoms of speech and trade must be balanced in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[15] Consistent with this legislative mandate, the FCC adopted rules that "attempt to balance the privacy concerns which the TCPA seeks to protect, and the continued viability of beneficial and useful business services."[16]

In particular, the FCC determined that "a solicitation to someone with whom a prior business relationship exists does not adversely affect subscriber privacy interests. Moreover, such a solicitation can be deemed to be invited or permitted by a subscriber in light of the business relationship."[17] In evaluating whether a customer has given prior express consent to be called, the FCC concluded that

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[14] The Telephone Consumer Protection Act of 1991, Public Law 102-243, December 20, 1991, 47 U.S.C. §201 et. seq, §227 ("TCPA"). The TCPA imposes restrictions on the use of automatic dialing systems, artificial or prerecorded voices and the use of telephone facsimile machines to send unsolicited advertisements. It also directed the FCC to adopt rules to address consumers who do not wish to receive unsolicited advertisements, including voice solicitations.

[15] TCPA at §2(9). Similarly, the legislative history of the Telemarketing Act states that "[the] regulat[ion] of legitimate, mutually-beneficial activities is not the purpose of the Telemarketing Act . . . rather the Act was intended to "strike[] an equitable balance between the interest of stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses." H.R. Rep. No. 103-20.

[16] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CC Docket No. 92-90, Report and Order, 7 F.C.C. Rcd., 8752, 8754 (1992). The TCPA, unlike the Telemarketing Act, expressly authorized the adoption of a single national "do not call" database but prohibited the FCC from restricting telemarketing calls to persons that have entered into an established business relationship.

"persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."[18] The FCC also held that a consumer's established business relationship with one company may, in certain circumstances, extend to the company's affiliates and subsidiaries.[19]

The FCC made clear, however, that customers would still be able to avail themselves of the specific company "do not call" list to protect their privacy interests. Under this rule, companies would be expected to honor any requests not to call again notwithstanding any pre-existing business relationship with the consumer. As the FCC explained, "a customer's request to be placed on the company's do-not-call list terminates the business relationship between the company and that customer for the purpose of any future solicitation."[20] Similarly, the FTC's rules require companies to maintain company-specific "do not call" lists.

Moreover, consumers covered by an "established business relationship" exemption would still be protected by other aspects of the TSR and the TCPA, which govern abusive and harassing conduct and impose calling hour restrictions.[21]

In implementing the TCPA, the FCC struck the appropriate balance between consumers' desire to keep out unwanted calls and telemarketers' pursuit of voluntary commercial relationships with the public. Moreover, Congress envisioned parallel regulations when it directed the FTC to "take into

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17 Id. at 8770.

18 Id. at 8769, citing House Report, 102-317, 1st Sess., 102nd Cong. (1991), at p. 13, noting that in such instances "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."

19 7 F.C.C. Rcd. at 8771.

20 Id. at 8770; see also 8766-67.

21 See e.g. TSR, §310.4; 47 C.F.R. §64.1200(e).

account the obligations imposed by the TCPA and avoid adding burdens to legitimate telemarketing."[22] Indeed, in legislating the privacy rights of cable customers in the Cable Act of 1984, Congress recognized the importance of a company's dealings with its customers when it allowed cable operators to collect and disclose personally identifiable information to the extent necessary to conduct legitimate business activities relating to cable service or other services provided by the cable operator.[23]

NCTA urges the FTC, therefore, not to disrupt the free flow of communications between businesses and their customers and to adopt an "established business relationship" exemption that essentially mirrors the exemption adopted by the FCC under the TCPA.[24]

II. THE PROPOSED RULE IMPOSES UNWARRANTED AND UNNECESSARY RESTRICTIONS ON THE DISCLOSURE OF CUSTOMER BILLING INFORMATION IN LEGITIMATE TELEMARKETING ACTIVITY

The proposed rules prohibit telemarketers from receiving a customer's billing information from anyone other than the customer for use in telemarketing, or disclosing any customer's billing information to third parties for use in telemarketing. The FTC believes that sharing of consumers' pre-acquired billing information causes or is likely to cause substantial injury to consumers "which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to companies or to competition."[25] While the trafficking of customer account information by unscrupulous telemarketers is a legitimate concern, the proposed restrictions sweep wholly proper and beneficial

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22 House Report at 8.

23 Cable Communications Policy Act of 1984, §631; 47 U.S.C. §551.

24 Under TCPA rules, 47 C.F.R. §64.1200(f)(4), "the term established business relationship means a prior or existing relationship formed by a voluntary two-way communication between that person or entity and a subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party."

25 Notice, 67 Fed. Reg. at 4514.

telemarketing activity involving pre-acquired account information under the rules' aegis. These day-to-day activities, which occur in the normal course of business, could hardly be viewed as abusive or deceptive acts or practices by any stretch of the definition.

Many cable companies use third-party service centers or telemarketing sales agents to conduct outbound telemarketing calls. For example, some companies utilize firms that contact customers who move to a new community and enable them to establish accounts with the local cable operator, utility company, newspaper, and related entities in one telephone call. Similarly, cable companies and utility companies have entered into cross-marketing and one-stop marketing agreements to achieve greater efficiency. In every case, these third party vendors and subcontractors are contractually bound to maintain the confidentiality of customer records and to abide by cable privacy law and generally applicable privacy law and policy.

Under the amended rules, cable companies would be precluded from exchanging customer account information with *any* of the third party vendors in the foregoing situations. Indeed, these companies would not be able to obtain information acquired by their own vendor about their own customers for use in further transactions or to upsell in subsequent telemarketing activity. When a consumer chooses to transact business with a company by providing billing information, he or she presumably understands that the seller possesses the account information and may access it for further transactions with the customer. The buyer is likely to expect that the credit card information is retained internally – whether obtained by the company's own call center or an outside service center – for subsequent contact with the customer. As industry participants told the FTC, the ability to access pre-acquired account information generates efficiencies and speeds the completion of the call, all to the consumer's benefit.[26]

NCTA urges the Commission to revise the proposed rule to clarify that it does not encompass the disclosure or transfer of customer billing information between a company and its own third party telemarketing agent for use in telemarketing calls involving the company's own products and services. The sharing of this information for use in telemarketing would be limited to the purchase or sale of the company's goods or services. In addition, the FTC should clarify that the rule is not intended to preclude an acquired or merged company from transferring customer billing information to the successor-in-interest company following the sale or other transfer of control.

III. THE PROPOSED AMENDMENT OF THE DEFINITION OF "OUTBOUND TELEPHONE CALL" IS OVERBROAD

The Commission proposes to modify the TSR's definition of "outbound telephone call" to encompass not only outbound calls but certain inbound calls. In particular, it would cover a customer's inbound call when it is (1) transferred to a telemarketer other than the original one; or (2) involves a single telemarketer soliciting on behalf of more than one seller (or telemarketer seeking a charitable contribution).[27] In these situations, the transferred inbound call or second solicitation would be regarded as an "outbound telephone call" and subject to applicable rules.

The FTC proposes this change in response to evidence in the rule review record on the increased practice of upselling.[28] It determined that treating the transferred call, or call in which a telemarketer represents two separate sellers, as a separate outbound call will ensure that consumers receive the

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26 Id.

27 Id. at 4500.

disclosures required in the TSR, thereby providing material information to make an informed decision.[29] But upon closer review, the proposal would lead to some unintended and absurd results.

First, the proposed definition of an "outbound telephone call" encompasses "any telephone call to induce the purchase of goods or services . . . when such telephone call . . . is transferred to a telemarketer other than the original telemarketer."[30] This could be interpreted as requiring TSR disclosures and other requirements whenever a telemarketer, or customer service representative in the cable industry's case, receives an inbound call from a customer and transfers the caller to another telemarketer to furnish additional information or to otherwise complete a transaction. This result could not have been intended. The FTC should clarify the definition of "outbound telephone call" to make clear that it does not include inbound calls transferred between telemarketers representing the same seller.

Second, the revised outbound call definition would subject an inbound call transferred to another telemarketer for upselling of products or services to TSR restrictions related to calling time, and the proposed national "do not call" registry requirements. The rules provide, for example, that it is an "abusive telemarketing act or practice and a violation of the rule for a telemarketer to engage in an outbound call to a person's residence at any time other than between 8 a.m. and 9 p.m. local time at the called person's location."[31] This would mean that before a telemarketer could transfer an inbound caller to another seller's telemarketer, the original telemarketer would have to determine if the unsolicited call is taking place between the restricted hours and whether the caller's telephone number is on the national

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[28] Id.

[29] Id.

[30] Id. at 4541, Proposed Rule 310.2(t)(2).

"do not call" registry. This is impractical and unnecessary. Moreover, it does nothing to address the FTC's underlying concern regarding material disclosures about the identity of the second seller and the purpose of the second transaction.

In light of these factors, the Commission should modify the proposed definition of "outbound telephone call" to ensure that only the disclosure requirements are applicable to telemarketers who engage in upselling when a customer initiates the call.

IV. THE FTC SHOULD MINIMIZE THE COST AND BURDEN OF A NATIONAL DO NOT CALL REGISTRY BY PREEMPTING INCONSISTENT STATE DO NOT CALL LAWS AFFECTING INTERSTATE TELEMARKETING AND REQUIRING CONSUMERS TO RENEW THEIR LISTING ON AN ANNUAL BASIS

As the Notice discusses, there are at least 20 states that have enacted "do not call" statutes, generally involving either a state-run registry or requiring telephone companies to place a black dot by the names of consumer who do not wish to receive telemarketing calls.[32] In addition to the federal and state "do not call" laws, the Direct Marketing Association ("DMA") administers a voluntary Telephone Preference Service ("TPS"), which allows consumers who want to limit telemarketing calls to place their names and telephone numbers on the TPS list free of charge. And, as described earlier, companies subject to the federal Telemarketing Act and the Telephone Consumer Protection Act must maintain company-specific do not call lists.

If the Commission adopts the national "do not call" registry, it is important to note that companies conducting interstate business transactions will have the burden of having to obtain and reconcile multiple state "do not call" lists, the TPS list, company-specific lists, and lists of customers

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[31] Id. at 4543, TSR 310.4(c).

[32] Id. at 4517, n.239.

who grant "express verifiable authorization" to call them under the national "do not call" regime. Integrating these various lists on an on-going basis will be costly and burdensome. In rejecting the creation of a national database, the FCC found that a national "do not call" list would be "costly and difficult to establish and maintain in a reasonably accurate form."[33]

Nevertheless, if the national registry is established, we urge the Commission to preempt inconsistent or conflicting state laws that apply to interstate telemarketing calls. This limited preemption will help simplify the process, reduce administrative costs and burdens, and improve accuracy.

In addition, NCTA believes that the accuracy of the national list will be enhanced if consumers are required to renew their telephone listing on an annual basis. Americans are very mobile and telephone numbers are frequently reassigned. The FTC acknowledges the difficulty of finding a "viable means of purging from the list telephone numbers" which have been reassigned to new customers.[34] In light of this fact, the FTC should retain telephone numbers on the registry for no longer than one year from the date the customer registers the number. Consumers wishing to renew their listing would utilize the automated registry system on an annual basis.

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33 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 7 F.C.C. Rcd. 8760, 8763-67 (1992).

34 Id. at 4520.

CONCLUSION

For the foregoing reasons, the FTC should (1) adopt an "established business relationship" exemption in the proposed national "do not call" registry rules; (2) remove unwarranted restrictions on the disclosure of customer billing information in the context of legitimate telemarketing activity; (3) clarify and amend the definition of "outbound telephone call"; and (4) preempt conflicting state telemarketing laws affecting interstate calls and (4) require consumers to register annually.

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